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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 669

NATHAN GOLLIN AND BENJAMIN RICHMAN,
Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FREDERIC M. P. PEARSE,
Counsel for Nathan Gollin;
HAROLD SIMANDL,
Counsel for Benjamin Richman.

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SUPREME COURT OF THE UNITED STATES

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No. 669

NATHAN GOLLIN AND BENJAMIN RICHMAN,
Petitioners, Appellants Below,
vs.

THE UNITED STATES OF AMERICA,
Respondent, Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent:

I

Summary Statement of Matter Involved

A. Petitioners were called to trial in the United States District Court for the District of New Jersey upon an indictment that contained two counts, the first count in

substance charging: that on or about June 15, 1946, at Newark, New Jersey, they did knowingly steal, take, and carry away from a certain automobile truck, in the custody and possession of P. Ballantine & Sons, 600 cases of bottled beer, which were moving as, and formed a part of and constituted an interstate shipment of freight in the course of shipment in interstate commerce; and the second count in substance charging: that they did on the same day at Keansburg, New Jersey, receive and have in their possession said beer, well knowing the same to be stolen, in violation of Title 18 U. S. C., Section 409 (R. 3).

B. Petitioners' contention requires a brief statement of the evidence. P. Ballantine & Sons' brewery occupies several blocks in the City of Newark (R. 15). The company uses the public streets adjoining its plant for loading and unloading its trucks and parking same. Shortly after midnight on Saturday, June 15, 1946, Theodore Barowsky, a Ballantine employee, whose duty it was to load and unload trucks, backed trailer truck No. 327 against the loading platform and loaded it with 600 cases of bottled beer (R. 9, 10). Another employee, the checker, checked the load, closed the door of the truck and sealed it (R. 11, 12). Barowsky signed the bill of lading—Ex. G-1 (R. 11, 79). It recited that the beer was consigned to Charles Luberger, North Tarrytown, New York (R. 11, 79). There was not enough room at the loading platform to allow the truck to remain there, so Barowsky put it to one side, by driving it around the corner and parking it in the street, in front of the Ballantine garage (R. 11, 16). He took the keys out of the truck and hung them in the garage and placed the signed bill of lading in the key ring (R. 12, 13, 16). It was company practice to post a schedule in the truck dispatcher's office whereon appeared the names of the drivers, the truck to which each was assigned, and the destination

of the truck and the type of merchandise that was in the load (R. 54). No schedule was produced at the trial. It was necessary for each of the drivers to report at the dispatcher's office where he received his assignment. The driver, if any, that had been assigned to the truck in question would have been required to report at the dispatcher's office and then go to the garage, obtain the truck keys and the bill of lading, and thereafter commence his journey (R. 16, 55). While Barowsky was loading another truck, he noticed that the truck in question was missing (R. 13, 14). He inquired at the garage as to whether or not it was being repaired, and was advised that it was not (R. 13). He found the keys and bill of lading in the garage exactly where he had placed them (R. 13, 17). He then notified his superiors (R. 13) and several hours later officers of the Newark Police Department found the truck on a street in the City of Newark, some distance from the brewery, empty (R. 19, 20). Some weeks later agents of the Federal Bureau of Investigation found the beer in two taverns at Keansburg, New Jersey (R. 48, 49, 60). Albert Siegel, proprietor of one of the taverns, testified that he had purchased the beer through the petitioner, Richman, and that Richman, in his presence, had divided the money paid for the beer with Gollin (R. 31, 32, 34).

Petitioners rested without offering any testimony and made motions for judgments of acquittal, upon the ground that the government had failed to prove that the beer in question was moving as, or formed a part of, or constituted an interstate shipment. The motions were denied by the Trial Court (R. 63, 64, 65).

The Trial Court instructed the jury—"that as a matter of law the truck was moving in interstate commerce at the time it is contended by the government that the beer was stolen therefrom. That is a matter of law. The facts are not disputed and that constitutes the jurisdiction of this

court and is a matter for the court to determine and not a matter for the jury to determine" (R. 71, 72). Petitioners were found guilty on both counts of the indictment and each sentenced to two years on the first count and one year on the second count to run consecutively (R. 2).

Petitioners appealed to the Circuit Court of Appeals for the Third Circuit, upon the grounds: (1) That the Trial Court erred in denying the several motions for judgments of acquittal; (2) That the Trial Court erred in the instruction above mentioned; (3) That the Trial Court erred in refusing to charge their request No. 2 (R. 78, 75).

The Circuit Court of Appeals held that the Trial Court had erred in its instructions to the jury and remanded the cause to the District Court for a new trial. However, it sustained the Trial Court in refusing to grant petitioners' motions for judgments of acquittal, and it is to this portion of the judgment of the Circuit Court of Appeals that this petition is addressed.

II

Jurisdictional Statement

An appeal was taken to the Circuit Court of Appeals for the Third Circuit, which on February 11, 1948 reversed the judgments of the District Court for the District of New Jersey, and remanded the case to that Court for a new trial, instead of reversing the judgments and remanding the cause for entry of judgments of acquittal and the discharge of petitioners. The opinion of the Court below has not yet been reported, but appears shortly following Record Page 87.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 347(a); Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; and Rule 37(b) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

III

Questions Presented

The questions presented are:

(1) Where persons are charged with stealing merchandise that was moving as, formed a part of, and constituted an interstate shipment and also with receiving same in violation of Title 18 U. S. C. 409, is the jurisdiction of the Federal Court established by proof that the merchandise was loaded by the seller, as shipper, upon its own truck, a bill of lading prepared, and the loaded truck put to one side to await the arrival of the shipper's employee, who, at some later time was to drive it to another State; and before the arrival of such driver, the loaded truck was stolen?

(2) Where persons are tried upon an indictment charging them with stealing merchandise that was moving as, formed a part of, and constituted an interstate shipment and also with receiving same in violation of Title 18 U. S. C. 409, is the Trial Court justified in denying motions for judgments of acquittal and the Circuit Court of Appeals justified in sustaining such action, where the proof is that the merchandise was loaded by the seller, as shipper, upon its own truck, a bill of lading prepared and the loaded truck put to one side to await the arrival of the shipper's employee, who at some later time was to drive it to another state; and before the arrival of such driver, the loaded truck was stolen?

IV

Reasons for Allowance of the Writ

The Circuit Court of Appeals erroneously decided that the theft of the beer in question took place while it was moving as, formed a part of, and constituted an interstate shipment. The Court's decision is based primarily upon the concept that interstate movement began when the loader,

for convenience, put the loaded truck to one side to await the arrival of the driver who was to take it upon its interstate journey. The Court implied that it would have ruled otherwise, if the loaded truck had been permitted to remain at the loading platform to await the driver's arrival. However, whether the truck, when stolen, was actually at the loading platform or parked in front of the company's garage made no difference, for in either event, it was, for all practical purposes, upon the shipper's premises; the place where the merchandise was produced, and the shipper contemplated that the driver would not start the loaded truck upon its interstate journey until he had reported at the dispatcher's office and received his instructions so to do. Then and only then would the driver be authorized to obtain the keys and bill of lading from the company garage, take possession of the truck and start it upon its interstate journey, but until the driver had actually taken possession of the truck, the shipper was free to do whatever it pleased with the shipment or the truck.

The ruling of the Court below is in direct conflict with the decisions of this Court in *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Coe* v. *Errol*, 116 U. S. 417, wherein it is decided that interstate commerce does not commence until the commodities have actually entered upon their final journey to another state. But, in *United States* v. *Fox* (C. C. A. 2), 126 F. (2d) 237, the Court seems to question whether this Court's decision in *Coe* v. *Errol, supra*, governs in determining when interstate commerce commences under the criminal statute herein involved. The question of when interstate commerce commences under the statute (18 U. S. C. 409) has not been decided by this Court. It is a question which arises frequently, and is of large public importance, and therefore should be decided by this Court.

The ruling of the Court below is also in direct conflict with the decision of the Circuit Court of Appeals for the

8th Circuit in *Wolk* v. *United States*, 98 F. (2d) 310, 317; that of the 2nd Circuit in *United States* v. *Fox*, 126 F. (2d) 237 and also the decision of the 5th Circuit, in *Sharp* v. *United States*, 281 F. 86, 88. In each of those cases, the Court considered the statute herein involved and decided that interstate commerce began only after the goods had left the premises and possession of the shipper and were actually in the hands of those whose task it was, to deliver them to their destination in the other state.

WHEREFORE, your petitioners pray that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court for its review and determination on a day certain to be therein designated, a full and complete transcript of the record and of all the proceedings of the said Circuit Court of Appeals in the said cases entitled in that court: *United States of America* v. *Nathan Gollin*, No. 9405, October Term, 1946 and *United States of America* v. *Benjamin Richman*, No. 9410, October Term, 1946, to the end that said cases may be reviewed and determined by this Court as provided for by the statutes of the United States and that the judgments herein of the Circuit Court of Appeals be reversed by this Honorable Court, and for such other further relief as to this Court may seem proper.

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Petitioner, Nathan Gollin;
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